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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 426.

GEORGE A. BALL,
Petitioner,

vs.

H. EARL COOK,
Superintendent of Banks of the State of Ohio in Charge of the Liquidation of The Union Trust Company, Cleveland, Ohio, Trustee,
Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

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This reply brief is addressed solely to respondent's contention that he does not rely, in support of his claim, upon activities of Van Sweringens which were found to have been in violation of their fiduciary duties to C.T.B. and Vaness.* That Van Sweringens violated their fiduciary duties to C.T.B. and Vaness in connection with the Morgan sale cannot be questioned, for the Special Master, the District Court and the Circuit Court of Appeals have all so held. (R. 2847-2849, 2898-2900, 3055, 3056.)

* In his main brief petitioner accurately and adequately stated the facts material for a consideration by the Court of the questions presented in the petition for writ of certiorari. In the restatement of the facts in respondent's answer brief there is a statement to the effect that "a similar plan was prepared for and taken by them (the Van Sweringens) to their first meeting with Ball three days later" (p. 4). Ball never saw or knew of this plan or any of the other plans of Van Sweringens until about the time of the trial of this case; and whatever plans Van Sweringens may have had with them at their first meeting with Ball, they were never shown to him. This is established by undisputed evidence. (R. 470, 471, 524, 525.)

In the District Court respondent was faced with the fact that his predecessor in interest—the Van Sweringen partnership—had not invested a dollar in Midamerica and that the written contract gave only an option to buy Midamerica stock on conditions which were never met. Respondent therefore tried his case on the theory that Van Sweringens, by reason of their unusual relationship to Morgan and to the collateral pledged by C.T.B. and Vaness, were able to and did procure for Midamerica a bargain purchase so great as to compel the inference that Van Sweringens were entitled to (and therefore that the agreement must be deemed in substance that they should have) ownership of 8250 shares of Midamerica, and that in consequence the condition precedent to the exercise of the option was in fraud of their creditors.

In support of this theory respondent introduced evidence that the securities purchased by Midamerica at the Morgan sale had a fair and reasonable value on the date of purchase which exceeded the price paid for them by more than $2,000,000 (R. 353-355; 395-396) and he convinced the trial court that Van Sweringens thereby had brought to Midamerica a bargain purchase "for which they were entitled to compensation." (Finding No. 17, R. 2720.) Faced on appeal and on the petition in this Court with the finding that in bringing a bargain purchase to Midamerica Van Sweringens had violated their fiduciary duties to C.T.B. and Vaness, respondent has abandoned the theory on which he obtained his judgment in the trial court and now boldly asserts that Van Sweringens' right to 8250 shares of Midamerica stock was not and is not an issue in the case.

Petitioner did not introduce the evidence on which the finding of a breach of fiduciary duty was based. That evidence was introduced by respondent as an essential part of his case in an effort to show the substantial consideration furnished by the Van Sweringens, to wit, their services,

arrangements and relationships, in connection with the acquisition by Midamerica of the collateral owned by C.T.B. and Vaness. If, as claimed by respondent (in invoking the doctrine of *Brooks v. Martin*, 69 U. S. 70; *Loughran v. Loughran*, 292 U. S. 216 and related cases) the illegality was a thing of the past and wholly unrelated to the present case, then the evidence of that illegality would not have been introduced by respondent. *But that evidence was introduced and relied upon by respondent* and his claim is therefore clearly within the doctrine of *McMullin v. Hoffman*, 174 U. S. 639.

The complaint (R. 1) and the opinion of the District Court (R. 2725) clearly show respondent's reliance and dependence upon the activities of Van Sweringens which have been found to be violative of their fiduciary duties to C.T.B. and Vaness.

The first count of respondent's complaint (incorporated by reference into all the other counts) alleged that J. P. Morgan & Co. and associates wanted to have Van Sweringens continue in the control of their "empire" (Par. 14); that the plans for Van Sweringens to retain control of the "empire" were facilitated by the manner in which the collateral was grouped for sale (Par. 16); that when the financing of the purchase of the collateral by Ball and Tomlinson had been secured by Van Sweringens, they advised Morgan who shortly thereafter gave due notice of intention to sell the collateral (Par. 19); that at the sale Van Sweringens caused the collateral to be purchased for Midamerica for $3,121,000 and that such collateral then had "*fair or reasonable market value*" of $6,455,101.62 (Par. 26 and Ex. 7 thereto); that by procuring for Midamerica the opportunity to acquire at said price said assets of such large value, Van Sweringens brought and contributed to Midamerica assets and services of a net value to Midamerica (*exclusive of control value*) substantially in excess of $3,300,000 and for such contribution

they became entitled then and there to the ownership and control of 8250 shares of Midamerica common (Par. 27); that said 8250 shares had an actual value in excess of $1,800,000 by reason of the great value of the services furnished and contributed by Van Sweringens (Par. 28); that the consideration for the 8250 shares "was the services, arrangements and commitments" furnished by Van Sweringens (Par. 28). Respondent offered evidence in respect of all of these averments.

Thus respondent relied on the right of Van Sweringens to the 8250 shares in consideration of their services and arrangements in procuring a bargain purchase of C.T.B. and Vaness collateral for Midamerica and this was the basis of respondent's claim that the option agreement was in fraud of Van Sweringens' creditors.

The opinion of the District Court clearly shows the essential nature of respondent's claim in that court:

> "It is the contention of plaintiff that the Van Sweringens not only called to the attention of defendant and Tomlinson the investment opportunity involved in the auction sale of Groups 1 and 3 on September 30, as stated in the letter of September 21, but also, through their position, relationship and activities leading up to the sale, furnished considerations which *were the moving, effecting force in bringing to and securing for the defendant, and for Midamerica Corporation, the bargain purchases of such groups of securities;* that such bargain purchases were of great value to the defendant, and to Midamerica Corporation; that the plan and arrangement, as set forth in the letter of September 21, whereby it sought to limit the rights and interests of the Van Sweringens in fifty-five per cent (55%) of the common stock of Midamerica Corporation so that such stock could not be reached by their creditors, was an effort to hinder and delay such creditors, and, therefore, constituted a fraud upon them and are invalid. * * * On the other hand, it is the contention of the defendant that the Van Sweringens furnished no considerations which were the moving, effecting

force in bringing to and securing for the Midamerica Corporation the bargain purchase of Groups 1 and 3 of the securities sold at the auction sale on September 30. * * *" (R. 2740, 2741, emphasis supplied).

Thus the real issue in the trial court was whether the Van Sweringens had brought to Midamerica a bargain purchase of the C.T.B. and Vaness collateral entitling them to ownership of the 8250 shares.

Findings Nos. 16 and 17 (R. 2718-2720) clearly disclose that the court found that Van Sweringens by reason of their relationship to J. P. Morgan & Co. and of their arrangements and activities in connection with the sale of the C.T.B. and Vaness collateral, brought a bargain purchase to Midamerica and that these services were the sole consideration furnished by them for the 8250 shares in controversy. These two findings, which are the basic findings of the trial court, establish the complete dependence of respondent's claim upon the right of Van Sweringens to the 8250 shares *as compensation for the very services which were indisputably in violation of fiduciary duty.* On the basis of these services respondent has obtained a judgment which, with interest, amounts to approximately $4,000,000.

It makes no difference what form the action takes. Claims based on conversion, tort, replevin or to enforce a resulting trust have all been condemned as illegal and unenforceable where, as a part of the plaintiff's case, he has been required to prove and rely upon arrangements or activities condemned by law.[1] There can be no doubt of the fact that the law condemns the activities of dominant directors who use their position and relationships or "their

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[1] *Flegenheimer v. Brogan*, 284 N. Y. 268, 30 N. E. (2) 591 (1940); *Meyers, et al. v. Henderson*, 204 Ind. 104, 181 N. E. 729 (1932); *Hutchins v. Weldin*, 114 Ind. 80, 15 N. E. 804 (1888); *Smith v. Barnes*, 129 Ore. 138, 276 Pac. 1086 (1929). See also *American Locomotive Co. v. Histed*, 18 F. (2) 652, 656 (D. C. Mo., 1926).

negotiating skill and business acumen'' to obtain a bargain purchase of the assets of their companies upon foreclosure —and particularly when millions of dollars of bonds and other securities of those companies are widely scattered in the hands of the public.

That respondent's claim is based fundamentally upon the activities of Van Sweringens in clear violation of their fiduciary duties is inescapable and no language or argument can obscure this basic fact.

Respectfully submitted,

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